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# Review

## The Justice as Janus-Figure

Sheldon M. Novick. *Honorable Justice: The Life of Oliver Wendell Holmes*. New York: Little, Brown & Company, 1989. Pp. 522. \$21.95.

**Allen D. Boyer**

On June 1, 1862, in the Virginia Tidewater, the 20th Massachusetts Regiment was ordered to prepare for an attack by Confederate cavalry. Fixing their bayonets, the men formed up in a hollow square. Company G, led by Captain Oliver Wendell Holmes, Jr., faced the direction from which the enemy was expected. As Sheldon Novick relates the story, Captain Holmes

unsheathed his sword and held his pistol ready—a cavalry charge would come right on them, and the men would have to stand. Wendell swore loudly that he would shoot the first man who ran or fired against orders.

But the Confederate cavalry did not come. Darkness fell, and the men of Company G cheered their captain for his bravery.<sup>1</sup>

Three aspects of this deserve consideration: what Holmes said he would do, how he said it, and how his men reacted. Properly read, the incident is a parable of our own relationship with our most celebrated judge.

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1. S. Novick, *Honorable Justice: The Life of Oliver Wendell Holmes* 59 (1989).

## HOLMES AND HIS MYTH

Justice Oliver Wendell Holmes broods like a sphinx on the distant horizon of American law. Most law students know to connect him with freedom of speech, the phrase "a clear and present danger," and the idea of shouting fire in a crowded theatre.<sup>2</sup> They conclude that Holmes was a champion of free speech, which is wrong. Most lawyers, recalling Holmes's dissent in *Lochner v. New York*,<sup>3</sup> consider Holmes a foe of Social Darwinism and liberty of contract. This is also wrong. *Buck v. Bell*,<sup>4</sup> on the sterilization of the mentally disabled, is probably the only case in which the general idea of what Holmes held coincides with what Holmes actually held—and here the Justice's declaration, "Three generations of imbeciles are enough," leaves little room for misunderstanding.

A generation back, we thought we knew how to think of Holmes. Holmes was the archetype of the grand old judge, someone who both embodied the virtues of the old social order and recognized the needs of the emerging age. Now we think we know better. In the 1940's, connections were drawn between Holmes's deference to authority and the might-makes-right *weltanschauung* of Hitler's Germany. By the 1960's, Holmes had come to be portrayed as a terrifying fossil, a man grossly indifferent to individual rights and to the plight of the underprivileged.<sup>5</sup>

This may be why, sometime around 1980, a new element surfaced in Holmes's black legend. Holmes was so much of a monster, one heard, that no one could stand to write about him. That was why a series of biographers—Felix Frankfurter, Mark DeWolfe Howe, and Grant Gilmore—had all proved unable to finish their task.<sup>6</sup>

At the start of *Honorable Justice*, Sheldon Novick seems to share this viewpoint.

Justice Holmes proved to be a shadowed figure, marked by the bigotry and sexism of his age, who in personal letters seemed to espouse a kind of fascist ideology. He was a violent, combative, womanizing aristocrat whose contribution to the development of law was surprisingly difficult to define.<sup>7</sup>

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2. See *Schenk v. United States*, 249 U.S. 47 (1919).

3. 198 U.S. 45 (1905).

4. 274 U.S. 200 (1927).

5. For a survey of currents in Holmesian scholarship, see White, *The Rise and Fall of Justice Holmes*, 39 U. Chi. L. Rev. 51 (1971).

6. Frankfurter put aside the project after being named to the Supreme Court. In addition to collecting and indexing Holmes's letters and papers—a huge achievement, to which Novick pays due homage—Howe completed two volumes, covering Holmes's career through 1882. M. Howe, *Mr. Justice Holmes: The Shaping Years* (1957) and *The Proving Years* (1963). Though Gilmore produced no book devoted solely to Holmes, the Justice figures in Gilmore's *The Death of Contract* (1974) and *The Ages of American Law* (1977). See also J. Monagan, *Grand Panjandrum: The Mellow Years of Justice Holmes* (1988) (collection of biographical essays); G. Aichele, *Oliver Wendell Holmes: Soldier, Scholar, Judge* (1989).

7. S. Novick, *supra* note 1, at xvii. Novick feels that "both Howe and Gilmore came to regret

This passage, on its own, would be as one-sided a portrait of Holmes as the one Catherine Bowen painted in *Yankee from Olympus*: "a man whose presence carried tradition . . . courtly, witty, scholarly, kind."<sup>8</sup> The measure of *Honorable Justice* is that Novick does not rest with such simplifications. He faces, ably, the challenge which wore down Holmes's earlier biographers: reconciling the absolutism of Holmes's opinions with the complexity of the man who wrote them.

### HOLMES IN HIS INTELLECTUAL CONTEXT

Most judges work within the closed system of the law. They apply, creatively misread, or criticize the elements which they find there. (Jackson, Cardozo, and both Justices Harlan were of this school.) For those who pursue an extra-legal agenda, nearly always the decisive factor is politics. (Here one finds John Marshall, and, at different ends of the political spectrum, William Howard Taft and William O. Douglas.) Holmes stands on his own—certainly unequaled, arguably unparalleled—in suggesting that legal decisions be measured by standards taken from cultural realms.

The opinions Holmes wrote contain few allusions and non-legal references; the *Lochner* tag-line is a notable exception. Like other judges, Holmes decided cases more readily on technical points and established doctrines than on the basis of philosophical principle. But Holmes's work, inevitably, must be read in the context of Holmes's life. Here it is that one finds the connection: through Holmes's non-judicial writings, his conversations and speeches, and his friendships and work relationships—the most enduring of which led to the intellectual and academic worlds, rather than to politics and finance.

"No one will ever have a truly philosophic mastery over the law who does not habitually consider the forces outside of it which have made it what it is," Holmes wrote.<sup>9</sup> Whether one speaks in terms of jurisprudential affinity, or in terms of the personal cult which surrounds him (and which remains unique among judges), Holmes is our intellectual grandfather. He gave us the archetype of the judge as intellectual, much as Oscar Wilde, his contemporary, helped create the persona of the artist as social rebel and satiric clown. Each man, in Wilde's phrase, put his genius into his life.

For Louis Brandeis, it has been suggested, an evening's leisure reading would have been the reports of the Interstate Commerce Commission.

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having undertaken" Holmes's biography. *Id.*

8. C. Bowen, *Yankee from Olympus: Justice Holmes and His Family* xi (1943). Such comments sound naive, but one should not be too hard on Bowen. Her book had all the flaws and all the unexpected virtues of a good television docudrama. If it fictionalized many details, it also captured Holmes's mythic dimension, which fact-bound essays on the Justice do not.

9. Holmes, *Book Notices*, 14 Am. L. Rev. 233 (1980).

Holmes's reading, reconstructed from the book lists he kept, was much more varied. He read and re-read Aristotle and Plato (possibly so that others might see him reading Aristotle and Plato). He also read Hobbes, Hegel, Marx, Spinoza, Herbert Spencer, Dante, *The Virginian*, Jean-Henri Fabré's *Souvenirs Entomologiques*, and *Moby Dick*. Other scholarly ties included youthful talks with Emerson, early associations with Henry and William James, a mountain-climbing tour of Switzerland with critic Leslie Stephen (later the father of Virginia Woolf), and sustained correspondences with Frederick Pollock, Harold Laski, and Kaneko Kentaro.

One could say that Holmes inherited these scholastic traits. As Brook Thomas has shown, the first decades of the nineteenth century saw an interpenetration of literature and law.<sup>10</sup> Irving, Lowell, Bryant, and Longfellow all studied for the law, and legal reading was a hobby of James Fenimore Cooper. James B. Thayer, Holmes's law partner and teaching colleague, had originally been offered a professorship of English at Harvard. As class poet of Harvard's class of 1861, and the son of Oliver Wendell Holmes Senior—essayist, novelist, poet, and medical reformer—Holmes was, perhaps, this era's last titan.

Holmes's links to nineteenth-century thought go beyond questions of influence; among his contemporaries, he was a front-line thinker. Across the disciplines, increasing mastery of the external world had become shaded by a new appreciation of the complexity of the internal world. In the years when Holmes was writing that the judge's certainty might be illusion,<sup>11</sup> Henry James was exploring the idea of the unreliable narrator, the fictional speaker whose mistakes and lies are perceived by the reader. Holmes defined law as "the prophecies of what the courts will do in fact."<sup>12</sup> This was close to the way in which Charles Peirce (a member, with Holmes, of the Cambridge Metaphysical Club) defined the objectives of Pragmatism—so close that a debate continues over the connection.

[I]n order to ascertain the meaning of an intellectual conception one should consider what practical consequences might conceivably result by necessity from the truth of that conception; and the sum of these consequences will constitute the entire meaning of the conception.<sup>13</sup>

10. B. Thomas, *Cross-Examinations of Law and Literature: Cooper, Hawthorne, Stowe and Melville* (1987). Robert Ferguson, another student of this era, observes, "The central texts of American republicanism acquire new coherence from a legal aesthetic just below the surface. Similar lines of force inform early American poetry and fiction." R. Ferguson, *Law and Letters in American Culture* 7 (1984).

11. See O.W. Holmes, *The Path of the Law*, in *Collected Legal Papers* 167, 181 (1920) (reprinted from 10 Harv. L. Rev. 457 (1897)).

12. *Id.* at 173.

13. 5 C. Peirce, *Collected Papers*, para. 9 (C. Hartshorne, P. Weiss & A. W. Burke ed. 1931-58). See White, *Looking at Holmes in the Mirror*, 4 L. & Hist. Rev. 440 (1986); Note, *Holmes, Peirce, and Legal Pragmatism*, 84 Yale L.J. 1123 (1975); Frank, *A Conflict with Oblivion: Some Observations of the Founders of Legal Pragmatism*, 9 Rutgers L. Rev. 425 (1954); Fisch, *Justice Holmes, the*

The man who wrote *The Common Law* was not alone in analyzing how abstractions manifested themselves in the real world. Frank Norris and Theodore Dreiser, with their novels about corporations and commodities speculation (*The Octopus* and *The Pit*, and *The Financier*), undertook a very similar task.<sup>14</sup> William James as well, in *The Varieties of Religious Experience*, sought to measure the transcendental against what could be ascertained from biology and psychology.

As a theorist, Holmes had a piece of rare good fortune: events kept pace with his formulations. "If you want to know the law and nothing else," he stated in 1897, in another of his famous declarations, "you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict."<sup>15</sup> About the same time, Paul Cravath reached the same insight. Surveying the ruinous effects of railroad strikes, and anticipating what the Sherman Act might bring, Cravath decided that the lawyer's job was no longer to plead for justice. In the future, the lawyer's job would be to keep the client out of court. Holmes's bad man was the *doppelganger* of Cravath's railroad-baron clients. Reinforcing this connection, on a psychological level, is the fact that the Justice often expressed admiration for James J. Hill, president of the Great Northern Railway.

The service which Holmes saw in the Civil War, the cultural watershed of his era, has been one of the brightest elements in his life story. He began as a lieutenant and ended as a twenty-three-year-old lieutenant-colonel; he saw action at Ball's Bluff, Antietam, and Chancellorsville, and was seriously wounded in each battle. Not particularly nostalgic, he nonetheless drew on the war for inspiration. It gave him the metaphor of "the soldier's faith," a stalwart dedication to duty.

[I]n the midst of doubt, in the collapse of creeds, there is one thing I do not doubt . . . and that is that the faith is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands, in a plan of campaign of which he has no notion, under tactics of which he does not see the use.<sup>16</sup>

This much was noble, but the metaphor had a darker implication. This was that a judge, like a soldier, should steadily follow his sovereign's orders; or, put differently, that judicial activism could only be justified by

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*Prediction Theory of Law, and Pragmatism*, 39 J. Philosophy 85 (1942).

14. See W.B. Michaels, *The Gold Standard and the Logic of Naturalism: American Literature at the Turn of the Century* (1987); R. Martin, *American Literature and the Universe of Force* (1981); Hopkins, *The Development of Realism in Law and Literature During the Period 1883-1933: The Cultural Resemblance*, 4 Pace L. Rev. 29 (1983).

15. Holmes, *supra* note 11, at 171.

16. Quoted in S. Novick, *supra* note 1, at 205.

fundamental crises. In *Giles v. Harris*,<sup>17</sup> one of his earliest Supreme Court opinions, Holmes held, in effect, that federal courts should not enforce the voting rights of black Southerners, unless the federal government were prepared to fight a new civil war to do so.<sup>18</sup> Yet *Giles* is not Holmes's final word on racial bias and Southern states' rights. It must be balanced—can one really say reconciled?—with *Nixon v. Herndon*, in which Holmes wrote for the Court in upholding black citizens' right to vote in the Texas Democratic primary.<sup>19</sup>

This judicial equivocation, too, is illumined by Holmes's Civil War service. In 1864, after three years of wounds and dysentery, he obtained a release from front-line duty. A letter home explained:

I am convinced from my late experience that if I can stand the wear & tear (body & mind) of regimental duty that it is a greater strain on both than I am called on to endure—If I am satisfied I don't really see that anyone else has a call to be otherwise. . . . I am not the same man (may not have the same ideas) & certainly am not so elastic as I was and I *will not acknowledge the same claims upon me under those circumstances* that existed formerly. . . .<sup>20</sup>

Saul Touster showed in 1965, in an unsurpassed study of Holmes's war-time writing, that our image of Holmes is an image which the Justice consciously shaped, by retelling certain tales and burning certain letters.<sup>21</sup> The soldier's faith was not as forthright as it seemed. It consisted less in what the infantry officer had actually felt than in what the scholarly judge felt compelled to hallow.

Holmes's jurisprudence is one of those subjects on which one should say either very much or very little. On *The Common Law*, Novick takes the latter course. "No short summary could do justice to this long, difficult, and original work," he apologizes.<sup>22</sup> But his summary, pared down to six short paragraphs, can be compelling in its eloquent suggestion.

For twelve evenings, Holmes spoke steadily, a frail figure describing an extraordinary vision. The common law seemed to be spread out before him like an immense, forbidding landscape, its contours heaved and buckled by unconscious forces—the passions for ven-

17. 189 U.S. 475 (1903).

18. Alabama's white residents might clearly intend to disenfranchise their black neighbors, Holmes wrote, but

[t]o meet such an intent something more than ordering the plaintiffs' names to be inscribed upon the lists of 1902 will be needed. . . . [R]elief from a great political wrong, if done as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political departments of the government of the United States.

*Id.* at 488.

19. 273 U.S. 536 (1927).

20. Quoted in S. Novick, *supra* note 1, at 85 (emphasis in original).

21. Touster, *In Search of Holmes from Within*, 18 Vanderbilt L. Rev. 437 (1965).

22. S. Novick, *supra* note 1, at 437.

geance and blame, the fierce instinct with which an animal defends what it has, the strange fantasy that an heir absorbs and becomes his father. Law began as a substitute for private violence and unrestrained passion. Its rules and explanations were only rationalizations for what judges felt obliged to decide. Unconscious motives lay behind their opinions. As civilization advanced and society became more complex, precedents were mechanically repeated, but new explanations were continuously invented, and eventually the outmoded form was reshaped by its new purpose.<sup>23</sup>

Mark DeWolfe Howe, in examining Holmes, chose "to place a book, rather than a living person, at the center of the stage."<sup>24</sup> Novick takes the other approach. *Honorable Justice* is a study of Holmes the object, not a critique of Holmes the subject. Novick consistently drops into the endnotes other discussions of Holmes's legal work: the Justice's constitutional theory, the structure of his article *Privilege, Malice, and Intent*, turn-of-the-century substantive due process doctrine, Holmes's sudden shift on freedom of speech, the dispute over *Buck v. Bell*, and even Holmes's "most famous contribution" to American common law, "that everyone is held to the conduct expected of an ordinary reasonable person, stated in objective terms."<sup>25</sup>

In discussing Holmes's years on the Supreme Court, Novick emphasizes famous cases: *Giles v. Harris*, *Northern Securities Co. v. United States*,<sup>26</sup> *Lincoln v. United States*,<sup>27</sup> *Lochner*, *Muller v. Oregon*,<sup>28</sup> *Hammer v. Dagenhart*,<sup>29</sup> *Schenk*, *Debs v. United States*,<sup>30</sup> *Abrams v. United States*,<sup>31</sup> *Gitlow v. New York*,<sup>32</sup> *United States v. Schwimmer*,<sup>33</sup> *Buck v. Bell*, and *Olmstead v. United States*.<sup>34</sup> This restriction is understandable, given the limits of the one-volume format, but this list is too exclusive. Not mentioned, and they should be, are *Bailey v. Alabama*,<sup>35</sup> *Frank v.*

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23. *Id.* at 158-59.

24. 2 M. Howe, *supra* note 6, at 253.

25. *See id.* at 444, 446-47, 456-57, 473-74, 477-78, 434. Cross-checking is irksome, but we may have been spoiled by law-review articles, which have the luxury of spending fifty pages on a single case.

26. 193 U.S. 197, 400 (1903) (Holmes's first dissent; application of Sherman Act to merger of railroad companies).

27. 197 U.S. 419 (1905) (Philippine tariffs struck down, in a slap in the face of William Howard Taft; Holmes writing for a unanimous Court).

28. 208 U.S. 408 (1908) (labor legislation on maximum hours upheld, following argument by Louis Brandeis).

29. 247 U.S. 251 (1918) (anti-child labor statute invalidated, over a dissent by Holmes).

30. 249 U.S. 211 (1919) (conviction of anti-draft speaker affirmed; Holmes writing for a unanimous Court).

31. 250 U.S. 616 (1919) (conviction of anti-war protestors affirmed, over a dissent by Holmes).

32. 262 U.S. 652 (1925) (conviction under New York criminal anarchy statute upheld, over a dissent by Holmes).

33. 279 U.S. 644 (1928) (denial of naturalization to pacifist affirmed, over a dissent by Holmes).

34. 277 U.S. 438 (1928) (use of illegally-obtained wiretap evidence allowed by Court, over a dissent by Holmes).

35. 219 U.S. 219 (1911) (Alabama statute enforcing debt peonage invalidated, over a dissent by



*Mangum*,<sup>36</sup> *Moore v. Dempsey*,<sup>37</sup> *Meyer v. Nebraska*,<sup>38</sup> *Nixon v. Herndon*, and *United States v. Ju Toy*.<sup>39</sup>

Novick makes it clear that Holmes sought to judge solely on legal issues; the Justice never read newspapers, and wanted to decide *Northern Securities*, a case involving railroad empires, as if it involved "two small exporting grocers." Novick is not as clear when it comes to presenting Holmes's theory of judicial deference.<sup>40</sup> For this one must turn to the voluminous body of law-review articles on Holmes's decisions, just as one should still look to Mark DeWolfe Howe for a discussion of Holmes's intellectual influences.

The book is stronger when it examines Holmes's work as a judge of ordinary cases. Of his time on the Massachusetts Supreme Judiciary Court, Novick observes:

The great Constitutional questions that Holmes would decide were still far in the future. The stuff of the court's work was adultery, greed, the private warfare of commerce, fights between neighbors and within families, wills, rapes, murders: the trivial, violent constants of human life, of the thousand-year-old common law.<sup>41</sup>

After two decades on this bench, when he moved to Washington, "Holmes found that he was again a member of what was fundamentally a common-law court."<sup>42</sup> He wrote opinions quickly, in two or three days' time. This was one reason he eventually turned out 873 majority opinions (a record which still stands, and which far outstrips his 30 concurrences and 72 dissents).<sup>43</sup>

To focus on great cases makes bad legal history. In Holmes's case, however, this may now be unavoidable. Most of his federal decisions belong to the era of *Swift v. Tyson* and the vanished jurisprudence of the federal

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Holmes).

36. 237 U.S. 309 (1915) (conviction at a trial dominated by lynch mob upheld, over a dissent by Holmes).

37. 261 U.S. 86 (1923) (mob-dominated trial held a violation of due process; opinion written by Holmes).

38. 262 U.S. 390 (1923) (ban on non-English language instruction invalidated, over a dissent by Holmes).

39. 198 U.S. 253 (1905) (denial of immigration to Chinese descendant approved; opinion written by Holmes).

40. Were Holmes on the Court today, he would be voting consistently with Antonin Scalia. The quintessential Scalia opinion, holding that a court cannot strike down laws simply because it disagrees with them, is the quintessential Holmes opinion. Compare Scalia's concurrence in *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 96-97 (1987) ("a law can be both economic folly and constitutional") with Holmes's majority opinion in *Debs*.

41. S. Novick, *supra* note 1, at 171.

42. *Id.* at 256.

43. Chief Justice Fuller was delighted with his Court's newest member: "We shall dispose of more than fifty cases at our next meeting—more than ever before I believe. . . . The Nimble Holmes has got out his last—I delayed his progress for about a week but he . . . I suppose [is] eager for more work." *Id.*, citing W. King, Melville Weston Fuller 291 (1950).

common law.<sup>44</sup> Whatever their merits, they were mooted by *Erie Railroad v. Tompkins*.<sup>45</sup> The reminder is useful, however, that Holmes could write hundreds of opinions for a generally conservative Court, working as smoothly with Taft as he did with Brandeis.

It is also a merit of this biography that Holmes's Japanese correspondents, early students at Harvard who discussed with him the traditions of their homeland, receive the same attention given to Holmes's English protégés.

The Japanese civil war was contemporary with the American, but how strange it must have been for Holmes to hear stories of these men who had fought in armor. When Kaneko left home, samurai men had still worn swords as part of their ordinary dress. Bushido, their code of chivalry and their romanticism about the feudal age just passing, struck a chord in Holmes. The Japanese had a "gentlemanly air of incurious languor," and were privately a little scornful of the blunt practicality of most American life.<sup>46</sup>

Holmes seems to have drawn a clarifying connection between their samurai code and his own vision of personal duty. Novick finds that *the path of the law* "is probably a conscious reference to the Tao" and to "Bushido, the Way of the Warrior, a term Holmes almost certainly knew."<sup>47</sup> In a book which Kaneko Kentaro gave to Holmes, the Japanese ethic is described in terms which Holmes might have used to describe the common law:

[Bushido] is not a written code—at best it consists of a few maxims handed down from mouth to mouth or coming from the pen of some well-known warrior or savant. . . . It was an organic growth of decades and centuries of military career. It, perhaps, fills the same position in the history of ethics that the English Constitution does in political history. . . .

Fair play in fight! What fertile germs of morality lie in this primi-

44. 41 U.S. (16 Pet.) 1 (1842).

45. 304 U.S. 64 (1938). "Primarily interested in the common law," Holmes's bitterest critic carped, "as a judge Holmes greatly influenced only constitutional law." Rogat, *The Judge as Spectator*, 31 U. Chi. L. Rev. 213, 256 (1964). But while this criticism is unfair, thanks to an accident of history—if *Erie* should be called such—one can still be thankful that Holmes failed to influence greatly American common law. Despite sound decisions like *Eaton v. Brown*, 193 U.S. 411 (1904), a probate case in which Holmes cut through supposition to the real intention of the testator, he was too often mesmerized by abstractions. In *Old Dominion Copper Mining and Smelting Co. v. Lewisohn*, 210 U.S. 206 (1908), Holmes let the fiction of corporate identity stand in the way of remedying a fraud caused by stock-watering, and with *Moore v. Bay*, 284 U.S. 4 (1931), his over-zealous concern for unsecured "gap" creditors had the effect of unsettling every secured loan in which a delay ensued between creation and perfection of the security interest.

46. S. Novick, *supra* note 1, at 147-48.

47. S. Novick, *supra* note 1, at 451.

tive sense of savagery and childhood. Is it not the root of all military and civic virtue?<sup>48</sup>

### HOLMES THE MAN

Like prior biographers, Novick mentions Holmes's personal flaws—vanity and ambition, namely—and then quietly sweeps them under the carpet. The problem here is a lack of hard proof. William James, who was close to Holmes in the late 1860's, described him as "formed like a planing machine to gouge a deep, self-beneficial groove through life."<sup>49</sup> He could be "disingenuous," Novick concludes, and "dissemble[d] his eagerness" over his appointments to the Massachusetts Supreme Judiciary Court and the Supreme Court. And there are other hints: that Holmes had his after-dinner speeches printed, that he liked telling people about his Civil War record (sometimes embroidering the facts), that in protocol-conscious Washington he refused to be seated below Cabinet members. He also "shamelessly primed" Morris R. Cohen, who was reviewing his *Collected Legal Papers* for *The New Republic*, by "passing on to him praise that others had given at the time the essays were first published."<sup>50</sup>

No one rises to the Supreme Court by accident. Throughout Holmes's career, things fell smoothly into place for him. Writing anonymously for the *American Law Review*, he dismissed Christopher Columbus Langdell as "perhaps the greatest living legal theologian"—then accepted a chair at the law school where Langdell was dean.<sup>51</sup> At the end of his first semester, he was offered an appointment to the bench; he accepted in less than three hours, without consulting his colleagues at Harvard. Little can be proven from these facts; much can be inferred. The true measure of Holmes's ambition may be that he covered his tracks so well.<sup>52</sup>

One clue may lie in Holmes's political involvements. We recall that Holmes served in the Union Army. We tend to forget, although the connection is logical, that he was a lifelong member of the Republican Party.<sup>53</sup> When Theodore Roosevelt named him to the Supreme Court, it

48. I. Nitobe, *Bushido: The Soul of Japan* 4-8 (1905), quoted in S. Novick, *supra* note 1, at 274.

49. Quoted in S. Novick, *supra* note 1, at 152.

50. *Id.* at 475.

51. O. W. Holmes, *Book Notices*, *supra* note 9, at 234. The relationship between Langdell and Holmes, too often seen as a manichean opposition of formalist and realist, is demolished in Touster, *Holmes A Hundred Years Ago: The Common Law and Legal Theory*, 10 Hofstra L. Rev. 673, 690-704 (1982) (reprinting Holmes's review of Langdell's casebook), and G. Gilmore, *The Ages of American Law*, *supra* note 6, at 41-67. But see Frank, *Mr. Justice Holmes and Non-Euclidean Legal Thinking*, 17 Cornell L.Q. 569 (1931).

52. For details of the academic maneuvering behind Holmes's leap to the bench, see 2 M. Howe, *supra* note 6, at 265-270. Holmes had allowed himself the option to resign from the faculty if a judicial appointment were offered.

53. Holmes's circle included Henry Cabot Lodge as well as Louis Brandeis. His first judicial appointment came in the last weeks of a Republican state administration, which was one of the rea-

was because Holmes's "soldier's faith" address had reassured the President that Holmes would give sound decisions on critical issues. Seen in this light, does this mean that Holmes's most famous speech was what Robert Bork's Indiana University lecture would be, a signal flag hoisted to those who name federal judges?

Holmes's fondness for women, by contrast, is a foible which Novick explores at length. This was already well-known; one familiar story has the ninety-year-old Holmes, seated on a park bench beside Brandeis, watching a pretty young woman walk past and exclaiming, "Oh, to be eighty again!" *Womanizing* does not quite describe him—Holmes never stalked; he flirted—but the Justice was quite persistently gallant. His career could be described in terms of women: Lowell factory girls and Boston ladies of letters, Washington matrons, and, finally, young women reporters.

The most serious liaison involved Lady Clare Castletown, an Irish noblewoman. How far this relationship went is uncertain. It was serious enough that he told her to write him in care of the courthouse, and wrote back faithfully—daily, at first. They corresponded for twenty years. And yet, even here, Holmes insulated himself. With the gray Atlantic between himself and Lady Castletown, for all but a few weeks of the affair, this was a romance, and nothing more.

One senses sublimation here, the presence of a strong libido which found full expression only in work. Holmes flirted in the same way that he read Casanova and went to burlesque shows. His affairs seem to have been half-hearted, adolescent strayings by a man who distrusted passion. When he joined the Harvard faculty, his mannerisms gravened. When he moved to the bench, judicial propriety settled like a pall over his home life:

[H]is own grandfather had resigned from the court, unable to carry the burden, and Holmes was not sure of his own health. . . . Accordingly, there was to be no more dining out, no more late parties, drinking, or talking. Even aside from the constant worry over his health, the work was new and required alert attention. . . . At his doctor's suggestion, Fanny began reading novels and poems aloud to Holmes in the evenings, to spare his eyes; Holmes would sometimes play solitaire while Fanny read.<sup>54</sup>

Prior books have portrayed Fanny Dixwell Holmes, Holmes's wife of fifty-seven years, as a plain, retiring, devoted helpmate. Novick shows that she was something more. She avoided photographs and interviews—which

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sons his decision was so speedily made. And so faithful a party man was he that he thought of resigning from the Supreme Court in 1928, when it looked as though Al Smith might be elected President; he did not want a Democrat to name his successor.

54. S. Novick, *supra* note 1, at 170.

gave rise, probably, to her reputation for shyness. Most of her own desire for self-expression went into embroidery. But she argued with her husband over his *Abrams* dissent (she wanted him to join the majority) and she ranked with him as a coiner of aphorisms. Washington, she said, was "full of famous men and the women they had married when they were young."<sup>55</sup>

Novick also traces well the troubling likeness between Holmes and his father. What his household members said, Oliver Wendell Holmes Senior wrote up for publication; that was the source for *The Autocrat of the Breakfast-Table* and his other books of essays.<sup>56</sup> During the Civil War, when he learned that his son had been wounded, Doctor Holmes traveled across Maryland and Pennsylvania to find him—but even then, his journalist's sense of a story never left him. His search became "*My Hunt After 'The Captain,'*" a celebrated article for *The Atlantic*. The elder Holmes would give up his family's privacy for a magazine story, making their private life part of the public domain. It is hardly surprising that his son would subordinate private life to public duty.<sup>57</sup>

*Honorable Justice*, despite some rough spots in the final text, is a solid and well-written biography.<sup>58</sup> Novick quotes Holmes often enough to make one wish he had quoted Holmes more. If the book has a flaw, it is a reluctance to spell out what its facts imply, but the facts are given, and the facts are marshalled well.

Between Holmes's life and Holmes's work as a judge, there is a connection which must be drawn. The man who grew apart from his friends was also the scholar who spoke of detaching morality from law. Holmes's deference to legislatures is what one would expect from a man who shunned personal and moral involvements.<sup>59</sup> His theory of judicial restraint refines and sublimates his personal aloofness; a judge who does not strike down laws need not face the responsibility of such action.

55. *Id.* at 260.

56. Doctor Holmes was the Autocrat. His son appeared as three successive characters: a divinity student, a Young Astronomer, and a Counsellor and Politician. Fanny Dixwell, interestingly, appeared under the name of Scheherezade.

57. The middle-aged doctor gave the young soldier a vial of laudanum, and urged him to take it if he were shot through the lungs, in order to spare himself a lingering death. This Roman paternalism prefigures the son's view of the human condition. A man instructed by his father in the way of committing suicide, and who accepts such instruction, will not be prone to spontaneous gestures of liberality.

58. It was on Holmes's ninety-second birthday, not his ninety-first (p. 376) that Franklin Delano Roosevelt paid him a visit. Calling the C.S.S. *Alabama* "an armored ship" (p. 145) conflates the commerce raider with either the Laird Rams or the C.S.S. *Stonewall*, none of which ever saw combat. To describe Utilitarianism as "puritanical" (p. 99) is very imprecise. It is worse to ascribe to Holmes "a kind of fascist ideology" (p. xvii) without clarifying that this adjective is used as a political term-of-art. On the other hand, Novick emends several previous errors. He shows, for example, that earlier reports of a friendship between Holmes and Sir Henry Maine arose from misdatings; the two men met only once, in 1874 (p. 432).

59. Holmes came to disfavor private charities, and left his money to the federal government. A religious skeptic, he and his wife attended Unitarian services: "In Boston one had to be something, and Unitarian was the least one could be." S. Novick, *supra* note 1, at 368.

It is tempting to make out a disparity between the free-thinking jurist-prudent and the authoritarian judge. Holmes failed to fuse thought and action, one could say; he never championed rights or liberties except when he could safely do so from dissent. But this viewpoint is rooted in anachronism. Because Holmes died in 1935, we forget that he was born in 1841. His era's history chronicled the victories of nations and races. Its politics saw imperialism as an acceptable option. Its science had discovered that the fittest prospered while the unfit perished.

Although the nineteenth century felt qualms, it took action. As a man of his era, Holmes was more likely to effectuate solutions than to accept doubt. Sometimes he is called a skeptic; in fact, he was a stoic. If principles proved illusory, facts could certainly be grasped. If ideas of truth might change tomorrow, answers could still be given today.

The truth is that Holmes's familiarity with intellectual and social realms outside the law may have contributed to his authoritarianism. If legal rules are not the only source which judges rely upon—if judges must draw upon a broad, interdisciplinary spectrum of cultural experience, rather than upon principles and logic—then it is really the decision of the judge which matters. To widen the range of criteria upon which a decision can be based means enlarging the powers of the decision-maker. In the life of the law, whose experience counted? The judge's.

This privileging of the judicial role, this focus on what the courts would do in fact, explains much of Holmes's own career. It accords with his own ambition. It also explains his fondness for cranking out opinions on common-law matters while ignoring the economic and political dimensions of *Northern Securities*, *Schenk*, and *Debs*. To refine an evolving legal doctrine, in the Justice's view, must have furthered the cause of humanity as much as defending any one individual's rights.<sup>60</sup>

In Novick's abridgement of *The Common Law*, a final insight is buried. *Law began as a substitute for private violence and unrestrained passion. Its rules and explanations were only rationalizations for what judges felt obliged to decide.* Holmes's masterwork has long been read as both historical study and theoretical polemic. If its vision of law parallels what the law had meant in Holmes's own life, can *The Common Law* be read a third way, as a psychological self-portrait? *The strange fantasy that an heir absorbs and becomes his father.* Did Holmes focus on succession because of his ambivalent relationship with his own father? *New explanations were continually invented, and eventually the outmoded form was*

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60. The interests which Holmes showed in his scholarly works foreshadow the severity he would show on the bench. He opened *The Common Law* by discussing how the law had originally imposed punishments upon inanimate objects. The theme which wound through successive lectures was how law had come to impose liability irrespective of a defendant's subjective motive. Such discussions implicitly equate defendants with non-human deodands and deny the individual self-worth of parties—at least, of defendants—before the court. In effect, they are instruments through which the judge makes known the law.

*reshaped by its new purpose.* This speaks, implicitly, to what Holmes has become, a subject reinterpreted by succeeding legal generations.

### HOLMES IN OUR TIME

*Honorable Justice*, the first full biography of a long-dead judge, was not brought out by a university press. It was produced by a commercial publishing house. (Little, Brown & Co., probably not coincidentally, was also the publisher of *The Common Law*.) Nor is its author a professional legal historian; Novick's background lies in environmental law.

These facts reveal our continuing fascination with Holmes. Most of his holdings no longer bind us. We shift losses now to distribute costs, not if and only if the defendant was at fault. Holmes wrote as if each person were a unit of the state; our writings suggest that government exists to interfere with people's lives. Yet Holmes remains one of our principal touchstones. We try out our newest hypotheses by asking what Grandfather would have done.<sup>61</sup> And while Holmes's fortunes have waned over the last two decades, one suspects that they will be revived as rights-based constitutional analysis is challenged by majoritarian theory.<sup>62</sup>

Holmes retains his relevance for the same reason that his writing strikes us as literary. By stamping judicial decisions with his own perspective, he opened up the distance between text, author, and reader, establishing a triune relationship which we feel compelled to keep reassessing.<sup>63</sup>

It is poetic, in the technical sense, to express oneself through metaphor and personification. It is poetic to match a latinate phrase with an Anglo-Saxon guttural, or to whipsaw an abstraction with a homespun example.<sup>64</sup> It is poetic to suggest, through the measured cadence of stately language, that the thoughts being expressed are logical and majestic, and therefore entitled to be obeyed.<sup>65</sup> But such refinements are tangential, in the context of a judicial opinion—which is, after all, merely the memoran-

61. See, e.g., Tushnet, *The Logic of Experience: Oliver Wendell Holmes on the Supreme Judicial Court*, 63 Va. L. Rev. 975 (1977); Kelley, *A Critical Analysis of Holmes's Theory of Torts*, 61 Wash. U. L. Rev. 681 (1983); Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. Rev. 30 (1985).

62. For an overture of the debate to come, see Fallon, *What Is Republicanism, and Is It Worth Reviving?*, 102 Harv. L. Rev. 1695 (1989).

63. If literature includes writings which are meant to shape or examine the society in which they are written, judicial opinions count as literature. Edmund Wilson ended his survey of Civil War writing with a long discussion of Holmes. See E. Wilson, *Patriotic Gore: Studies in the Literature of the American Civil War* 743-876 (1962).

64. Consider this passage: "When I think of the Law as we know her in the courthouse and the market, she seems to me a woman sitting by the wayside, beneath whose overshadowing hood every man shall see the countenance of his deserts or needs." O. W. Holmes, *Our Lady the Common Law*, in *The Mind and Faith of Justice Holmes* 29-30 (M. Lerner ed. 1943).

65. If one doubts the importance of the law's stately language to its acceptance as legitimate, consider that the Critical Legal Studies movement has tried to unsettle the law by adopting a new diction, speaking of *trashing* and *intersubjective zap*. See Gabel & Kennedy, *Roll Over Beethoven*, 36 Stan. L. Rev. 1, 4 (1984).

dum and order being issued by the court. Where a judge polishes his writing so self-consciously, he is treating his work as a personal performance.

The more sophisticated a communication, the more varied the ways in which it communicates. Holmes's dissenting opinions are as consciously layered, in this sense, as good fiction or poetry. Rather than answering the *Abrams* majority with lines of precedent, Holmes posed his appeal on a different level.

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment.<sup>66</sup>

It is rare for a judge to reflect on the issue of judging. Holmes carefully cast his dissent as a meditation on that theme, rather than presenting it as the judicial decision that it was. To take no action is in fact to take action. To wish to defer to the marketplace of ideas, in a censorship case, is to say that the Court should let the defendants go free. The *Abrams* majority might have unquestioned legal supremacy; Holmes carried the emotional and philosophical high ground.

### CONCLUSION

The law is majestic when a court expands it to reach a just outcome. There is also an awesome severity about a court when, so to speak, it lets the law take its course. In solitary defense of noble causes, as a judge defending *justice* against *law*, no jurist was ever more eloquent than Holmes. But when he chose *not* to favor justice—when he chose not to intervene, to let the law take its course—no jurist has ever been more blunt.

Holmes's fellow justices, it has been said, "were well aware of his scorn for any deviation from the result he thought the law required because that result might be 'unjust' to the individuals concerned."<sup>67</sup> In cases like *Buck v. Bell* and *Baltimore & Ohio RR. Co. v. Goodman*,<sup>68</sup> one finds no doubt,

66. *Abrams v. United States*, 250 U.S. 616, 624 (1919) (dissent of Justice Holmes).

67. 1 M. Pusey, Charles Evans Hughes 289 (1951).

68. 275 U.S. 66 (1927). This case contained the following prescription for safe driving, *circa* 1927:

When a man goes upon a railroad track he knows . . . that he must stop for the train, not the train stop for him. In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look.

*Id.* at 69-70. It also contains the heartless line, "[N]othing is suggested by the evidence to relieve



denial, or rationalization. Holmes faced squarely the results of his decisions: to sterilize a retarded woman, to deny compensation to a widow. As a poet of tough-mindedness, he ranks with Hemingway and Nietzsche.<sup>69</sup>

When Holmes spoke of the soldier's faith, significantly, he took the perspective of the soldier following orders, not that of the general making decisions, seeking to influence the path of humanity. A man under orders has given up both autonomy and responsibility. The traditional view is that Holmes was a stern judge because he remembered his time as a Union officer.<sup>70</sup> It seems likely, however, that the truth was the reverse: that Holmes's daily work as a judge kept him from forgetting Ball's Bluff, Antietam, and Chancellorsville.

Judges, like soldiers, make costly decisions. They take actions which irrevocably affect lives and fortunes. These tragic decisions—tragic in the sense that some equity must be sacrificed so that some other equity may be attained—are part of the daily life of the law. They are made whenever a court decides that precedent controls and that no exception will be made, or that a statute of limitations has run, or that credible evidence will not be presented to the jury. Whenever we make such decisions, putting aside our personal assessments of what full justice would require, we compromise ourselves with the law.

In *The Common Law*, there was the sense of a force which transcended the petty and temporal. Life might be a struggle, and law-making a slow, unprincipled enterprise, but evolution would lead to higher forms of life. Holmes's dissents envision such possibilities. In his "unjust" opinions, Holmes shows himself as a judge who did not flinch when responsibility came down to action. And once we have made such decisions ourselves, we feel a bond with Holmes. *Let others criticize, this feeling runs; we are the ones who have to act.*

We may often disagree with Holmes. It is also clear that we share with him this understanding. Behind his opinions, commands of the republic, we sense a common appreciation of what the law must do—and, more hopefully, an inextinguishable glimmer of what the law may someday achieve. He leads us by example. Even if their orders ring out harshly or

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Goodman from responsibility for his own death." *Id.* at 69.

69. Because Holmes wrote bluntly about cases with tragic consequences, we may assume too much too quickly. Holmes always wrote swiftly, and the cases would have had the same real-world effect even if written in blander language. (How many people have criticized Brandeis for concurring in *Bell*?) We should not presume that the style was necessarily the man. Benjamin Cardozo is remarkable for his Anglophiliac verbosity, but no one claims to find a connection between his rhetoric and his analyses—unless it is John Noonan, who in *Persons and Masks of the Law* (1976) belabors both Holmes and Cardozo for pursuing abstractions at the expense of humanity. See also *The Speech of Judges: A Dissenting Opinion*, 29 Va. L. Rev. 625 (1943) (Jerome Frank anonymously attacking Cardozo's style); cf. Freedman, *The Dissenting Opinions of Justice Musmanno*, 30 Temp. L.Q. 253 (1957).

70. Saul Touster has commented, "When he was talking about law he was talking about war; and when he talked of war he lived it through the images of law." Touster, *supra* note 51, at 689.

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threaten too broadly, determined officers help make a well-ordered regiment. And a well-ordered regiment, formed up in a proper square, will withstand any number of cavalry charges.

